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CORRECTION. — Attention is called to an error in the February issue in the statement of the decision in the case of *Brainerd* v. *State*, 131 N. Y. Supp. 221 (Ct. of Claims). 25 HARV. L. REV. 388. A majority of the court held that costs should not be allowed.

THE PATENTEE'S MONOPOLY AND THE ANTI-TRUST LAW. — How far does the Sherman Anti-Trust Act conflict with the monopoly granted to the inventor by the patent law?

The patent statute gives the right to exclude others from making, using, and vending the patented article.[1] But it gives nothing more.[2] It does not give the right to make, use, and vend, nor the property right in the patented chattel, nor the right to make contracts concerning it. These rights the patentee already has. The patented article itself, then, and contracts in reference to it are subject to the law of the land.[3] Thus it is subject to the police power of the state,[4] the law of public service,[5] and the criminal law.[6]

[1] U. S. COMP. STAT., 1901, § 4884, grants to the patentee "for the term of seventeen years the exclusive right to make, use, and vend the invention or discovery."

[2] See Bloomer *v.* McQuewan, 14 How. (U. S.) 539, 549.

[3] See Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., 77 Fed. 288, 293.

[4] A patented oil must conform to the standard of safety prescribed by the state. Patterson *v.* Kentucky, 97 U. S. 501. A patentee of medicine must take out a state license to prescribe it as a physician. Jordan *v.* The Overseers of Dayton, 4 Oh. 294.

[5] That the telephone is patented is no excuse for refusing service. Chesapeake & Potomac Tel. Co. *v.* Baltimore & Ohio Tel. Co., 66 Md. 399, 7 Atl. 809.

[6] A state statute may prohibit the use of a patented lottery device. Vannini *v.* Paine, 1 Har. (Del.) 65.

But the criminal law as to monopolies embodied in the Sherman Act was not intended to repeal the patent law.[7] In his own domain the patentee remains czar.[8] Contracts, therefore, which simply maintain his right to exclude others from making, using, and vending the patented article are valid.[9] The patentee need not license at all,[10] and he may ordinarily license on what terms he pleases.[11] He may license one to make, another to vend.[12] Though the vendor of ordinary chattels cannot fix the resale price so that the purchaser with notice is bound,[13] the patentee's right has often been recognized.[14] Even by contract, the ordinary vendor cannot determine a resale price if he constructs a system of such contracts with competing dealers.[15] But the patentee may fix the reselling price by a single contract,[16] or by a system of contracts, which stifle competition between dealers.[17] That the patentee owns several other patents does not abridge this right.[18] In these cases, the patentee merely subdivides his domain.

Has the patentee a right to extend his monopoly to unpatented articles? Conditions in licenses that the licensee purchase certain unpatented supplies only from the patentee have often been upheld.[19] But even this doctrine has been limited to articles "not of common use, such as can be used only with the patented device."[20] The Supreme Court has so far declined to pass on the doctrine.[21] A state statute expressly prohibiting such form of license seems constitutional.[22]

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[7] See Bement *v.* National Harrow Co., 186 U. S. 70, 92, 22 Sup. Ct. 747, 756.

[8] See Victor Talking Machine Co. *v.* The Fair, 123 Fed. 424, 426.

[9] Bement *v.* National Harrow Co., *supra.*

[10] Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748.

[11] See Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., 154 Fed. 358, 362.

[12] See Dorsey Revolving Harvester Rake Co. *v.* Bradley Mfg. Co., 12 Blatchf. (U. S.) 202, 204, Fed. Cas., No. 4,015, p. 947.

[13] Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339, 28 Sup. Ct. 722 (copyrighted books); Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376 (proprietary medicine).

[14] New Jersey Patent Co. *v.* Schaefer, 144 Fed. 437; The Fair *v.* Dover Mfg. Co., 166 Fed. 117; Automatic Pencil Sharpener Co. *v.* Goldsmith, 190 Fed. 205. But this right has not been settled by the Supreme Court. See Edison *v.* Smith Mercantile Co., 188 Fed. 925, 926. In the analogous case, the copyright-holder's right has been denied. Bobbs-Merrill Co. *v.* Straus, *supra.* In view of the prejudice of the common law against restraints on the alienation of chattels, the question may still be deemed open. See Dr. Miles Medical Co. *v.* Park & Sons Co., 220 U. S. 373, 404, 31 Sup. Ct. 376, 383.

[15] Dr. Miles Medical Co. *v.* Park & Sons Co., *supra.* This case set at rest the idea which had been cropping up in the lower federal courts that medicines manufactured under secret process were entitled to special favor. See Dr. Miles Medical Co. *v.* Platt, 142 Fed. 606.

[16] Bement *v.* National Harrow Co., *supra.* The ordinary vendor may fix the reselling price in a single transaction. Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174.

[17] Rubber Tire Wheel Co. *v.* Milwaukee Rubber Works Co., *supra;* Goshen Rubber Works Co. *v.* Single Tube Automobile & Bicycle Tire Co., 166 Fed. 431.

[18] Indiana Mfg. Co. *v.* Case Threshing Machine Co., 154 Fed. 365.

[19] Heaton-Peninsular Button-Fastener Co. *v.* Eureka Specialty Co., *supra;* Dick Co. *v.* Henry, 149 Fed. 424; Crown Cork & Seal Co. *v.* Brooklyn Bottle Stopper Co., 172 Fed. 225.

[20] Cortelyou *v.* Johnson & Co., 145 Fed. 933.

[21] See Cortelyou *v.* Johnson & Co., 207 U. S. 196, 28 Sup. Ct. 105. The case of articles not of common use is now pending in the Supreme Court on *certiorari.* Dick Co. *v.* Henry, *supra.* See Crown Cork & Seal Co. *v.* Standard Brewery, 174 Fed. 252, 259.

[22] Opinion of the Justices, 193 Mass. 605, 81 N. E. 142.

But the patentee went further in a recent case. By a system of licenses of a patented tool, useful but not indispensable in the manufacture of bathtubs, the patentee fixed non-competitive prices on the unpatented bathtubs in the hands of manufacturers and dealers. *United States* v. *Standard Sanitary Mfg. Co.*, 191 Fed. 172 (Circ. Ct., D. Md.). The system was held illegal under the Sherman Act. The patentee's right to monopoly in the patented article was held to protect him no further. The distinction between this and the last class of cases seems clear. In them reselling prices were not regulated, and as to selling competition had freer play. Moreover, the articles were incidental to the patented device. Judged by the light of reason, such incidental restrictions on incidental articles may well be valid.[23]

Again, where the owners of different patents restrict competition between themselves the monopoly is extended beyond that conferred by the patent grant.[24] For the imperfect competition between the patented articles is thus destroyed. The right to exclude others from the patented article alone does not sanction the suppressing of competition with a different article, though patented. The scheme is clearly illegal if the restriction of competition between the different patentees extends beyond the life of their patents,[25] or includes articles not patented.[26]

DISCRIMINATION BY RAILROADS IN ELEVATOR ALLOWANCES TO SHIPPERS. — The utilization of control over the instrumentalities of public service to foster monopolies in other trades constitutes one great vice of most discrimination.[1] It is well established that public service companies must not take advantage of their exceptional position to discriminate in favor of their collateral business undertakings.[2] Wherever they engage in serving themselves, the obvious opportunity for secret discrimination justifies suspicious scrutiny and restriction.[3] The danger inherent in such combinations of conflicting interests has even been held sufficient to render them illegal *per se*.[4] Thus interstate carriers are forbidden to

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[23] Possibly the vendor of an ordinary chattel may similarly require the purchase of incidental supplies as part of the price.

[24] Blount Mfg. Co. *v.* Yale & Towne Mfg. Co., 166 Fed. 555; National Harrow Co. *v.* Quick, 67 Fed. 130; National Harrow Co. *v.* Hench, 83 Fed. 36. *Contra*, United States Consolidated Seeded Raisin Co. *v.* Griffin & Skelley Co., 126 Fed. 364; Central Shade-Roller Co. *v.* Cushman, 143 Mass. 353, 9 N. E. 629.

[25] Strait *v.* National Harrow Co., 18 N. Y. Supp. 224.

[26] Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581; State *v.* Creamery Package Mfg. Co., 110 Minn. 415, 126 N. W. 126, 623. *Cf.* Straus *v.* American Publishers' Association, 177 N. Y. 473, 69 N. E. 1107.

[1] See Hays *v.* Pennsylvania Co., 12 Fed. 309, 313; Scofield *v.* Railway Co., 43 Oh. St. 571, 609, 3 N. E. 907, 923.

[2] Brass *v.* North Dakota *ex rel.* Stoeser, 153 U. S. 391, 14 Sup. Ct. 857; Louisville Transfer Co. *v.* American District Tel. Co., 1 Ky. L. J. 144.

[3] New York, N. H. & H. R. Co. *v.* Interstate Commerce Commission, 200 U. S. 361, 26 Sup. Ct. 272; In the Matter of Grain Rates, 7 Interst. C. Rep. 33. See 2 WYMAN, PUBLIC SERVICE CORPORATIONS, § 1359.

[4] Central Elevator Co. *v.* People *ex rel.* Moloney, 174 Ill. 203, 51 N. E. 254; Hannah *v.* People *ex rel.* Attorney General, 198 Ill. 77, 64 N. E. 776. See 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 710; 20 HARV. L. REV. 511, 529–531.